ORIGINAL

No. 87-1102

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1987

CHARLES L. SCHLEIGH, In his official capacity as principal clerk of the District Court for Washington County, and NANCY MUELLER, in her official capacity as clerk of the District Court for Howard County, and WILLIAM A. DORSEY, in his official capacity as administrative clerk of the District Court of Baltimore City,

Petitioners

versus

ESTHER V. REIGH and IVERY MAE SIMPKINS and LENORA C. DANNIE,

Respondents

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondents

COUNTERSTATEMENT OF QUESTION PRESENTED

Does the Civil Rights Attorney's Fees Act, 42 U.S.C. §1988, authorize the award of attorney's fees to a plaintiff who caused the defendant's behavior to change in an enduring way even though judgment on the merits was entered in favor of the defendant?

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COUNTERSTATEMENT OF THE CASE

In January, 1983, the Respondents filed this action pursuant to 42 U.S.C. §1983 seeking declaratory and injunctive relief against the clerks of the state district courts for the three counties in which the Respondents resided. The Respondents maintained that the Maryland district court rules in effect at that time permitted bank accounts containing only exempt funds to be summarily attached without providing them with timely and adequate notice and an opportunity for a timely hearing. The Respondents contended that the clerks, by issuing orders for attachments of exempt funds under color of state law, denied them due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. They further contended that these actions violated the supremacy clause of the United States Constitution. The Respondents alleged that the actions of the clerks caused them irreparable injury by depriving them of their exempt assets for a significant period of time.

The rules of procedure in question at that time did not provide that any notice whatsoever of the attachment be served on the judgment debtor. M.D.R. G47; App. at 102a.[1] If a judgment debtor happened to contest the attachment by filing a motion, a hearing was to be held "forthwith" whether or not one had been requested. M.D.R. G51; App. at 102a.

These particular rules of procedure remained in effect throughout the course of the lawsuit until July 1,

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[1] All citations to the Appendix refer to the Petitioner's Appendix.

1984 when amendments to them became effective. [2] This was approximately four months before the District Court made its decision on the merits. The amended rules were an improvement to the original rules. [3] Respondents contended before the District Court that these revisions, though an improvement, violated the due process clause by not requiring that the notice served upon the judgment debtor contain specific information regarding the most common exemptions and the procedures available to obtain a release of the property, and by not requiring that a hearing be held or decision made on a motion to release the attached property within a specified period of time.

On October 29, 1984, the District Court found the original and the amended rules to be unconstitutional and agreed with claims of the Plaintiffs. Reigh v. Schleigh, 595 F.Supp 1535, 1554-1557 (D. Md. 1984); App. at 149a-150a, 155a-156a, 160a-161a. [4]

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[2]The Maryland Court of Appeals has the ultimate authority to make changes in the state rules of procedure. Md. Cts. & Jud. Proc. Code Ann. §1-201. Amendments are suggested to that Court by the Maryland Court of Appeals Standing Committee on Rules of Practice and Procedure (hereafter referred to as the "Rules Committee").

[3]They require that a copy of the writ of garnishment be mailed to the judgment debtor "promptly" after service upon the garnishee. Md. Rule 3-645(d); App. at 119a-120a. The writ must also notify the judgment debtor and garnishee that federal and state exemptions may be available and notify the judgment debtor of the right to contest the garnishment by filing a motion asserting a defense or objection. Id. If a judgment debtor files a motion to quash and requests a hearing, the hearing must be held "promptly". Md. Rules 3-645(i); 3-643(b); App. at 122a, 118a. If a hearing is not requested upon such a motion, there is no rule specifying when a court must decide a motion to quash. Md. Rules 3-643(d); 3-311(d); App. at 118a, 116a.

[4]The trial and appellate court decisions on the merits will be referred to as Reigh I. The trial and appellate court decisions on the attorney's fees issue will be referred to as Reigh II.

The clerks appealed that portion of the decision which declared that the amended rules were unconstitutional. They did not appeal the finding that the original rules were unconstitutional. The Fourth Circuit vacated and remanded holding that the amended rule regarding the provision of notice as to the availability of exemptions was constitutional. Reigh v. Schleigh, 784 F.2d 1191, 1196 (4th Cir. 1986) cert. denied, 107 S. Ct. 167 (1986); App. at 57a. With respect to the "prompt" hearing requirement, the Fourth Circuit held that, based upon the record before it, there was insufficient evidence of extended delay and therefore the standard was adequate. Reigh I, 595 F.Supp. at 1199; App. at 67a.

Following remand, the District Court, upon motion, awarded the Respondents a limited amount of attorney's fees because they "prevailed to a limited extent." App. at 30a. [5] On appeal, the Fourth Circuit affirmed. Reigh v. Schleigh, 829 F.2d 1334 (4th Cir. 1987); App. at 1a-4a.

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[5] With respect to this holding of the District Court, its reasoning was that the notice to the judgment debtor must say more than simply that there is a right to contest the garnishment by filing a motion asserting a defense or objection. Reigh I, 595 F.Supp at 1555-1556; App. at 154a-155a. It later held that the Fourth Circuit in Reigh I had not overturned that aspect of its decision with respect to information concerning the procedures available to the judgment debtor. Reigh II, App. at 17a. In its decision on the attorney's fees award, the Fourth Circuit did not disturb this finding by the District Court. Reigh II, 829 F.2d at 1336, App. at 4a. The District Court also factually found that the Rules Committee approved this change in their notice on a "permanent" basis, which factual finding the Fourth Circuit upheld. Id. at 1136, App. at 4a.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO WHICH STANDARD TO APPLY WHEN A JUDGMENT ON THE MERITS IN A CIVIL RIGHTS CASE IS AWARDED TO THE DEFENDANT BUT WHERE IT IS CLAIMED THAT THE PLAINTIFF'S LAWSUIT CONTRIBUTED TO CHANGES IN THE DEFENDANT'S BEHAVIOR

A.

The Fourth Circuit Applies The Smith Test, A Revision Of The Bonnes Test

The Petitioners claim that the decision of the Fourth Circuit in Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979), cert. denied, 455 U.S. 961 (1982) conflicts with standards articulated in other circuits as to what constitutes a "prevailing" party for purposes of an award of fees. The Petitioners ignore the fact that the standards set forth in Bonnes have been revised by the Fourth Circuit in later cases. The Fourth Circuit has aligned itself with the "catalyst" theory adopted by the First Circuit in Nadeau v. Helgemoe, 581 F.2d 276, 281 (1st Cir. 1978). [6]

While the Fourth Circuit decision in Bonnes did not include the second prong of the Nadeau test, Bonnes was later modified by the Fourth Circuit in Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980), where the Court stated:

> As we comprehend the rule, to "prevail" a party must establish in an enduring way that he or she was right on a matter in issue and

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[6] The Nadeau Court articulated a two-pronge test: 1) as a matter of fact, the suit must have been a necessary and important factor in achieving the improvements sought; and 2) as a matter of law, the suit must not have been frivolous, unreasonable or groundless. Nadeau v. Helgemoe, 581 F.2d 276, 281 (1st Cir. 1978). This standard was discussed and refined on another occasion by the First Circuit in Coalition for Basic Human Needs v. King, 691 F.2d 597, 598-599 (1st Cir. 1982).

> that the litigation activities served to establish the existence of the right or contributed to an enjoyment of the right. There need not be a formal adjudication in the party's favor; a vindication of rights obtained by a settlement or a consent judgment may be sufficient as may a showing that the plaintiff's actions were a catalyst which caused the defendant to remedy his errant ways.

Id. at 346-347. [7] Further, the Court noted, consistent with the second prong of Nadeau, the legislative history of the relevant fee statute and stated that one goal of such legislation is to deter the bringing of lawsuits without foundation. Id. at 347. [8]

The Fourth Circuit later confirmed its shift to the Nadeau test in Disabled In Action v. Mayor, 685 F.2d 881, 885, n.3 (4th Cir. 1982) ("In our view, plaintiffs became entitled to attorney's fees when they won, by way of a settlement, practical relief on colorable claims.") [9] The

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[7] It is ironic that the Petitioners argue that Bonnes is the standard utilized by the Fourth Circuit in its petition to this Court. On appeal to the Fourth Circuit, the Petitioners argued that the standards set forth in Smith were applicable. See, Brief of Appellants/Cross-Appellees at 15. The Respondents argued that the Court ought to apply Bonnes. See, Brief of Appellees/Cross-Appellants at 17-18. In its decision which is the subject of this petition, the Fourth Circuit cited only to Smith in upholding the award of a small amount of attorney's fees based upon limited success. Reigh II, 829 F.2d at 1335; App. at 3a. The Fourth Circuit, agreeing with the Petitioners as to the applicable law, nevertheless, affirmed the award of fees. The Petitioners never sought a rehearing in the Fourth Circuit on the difference between the Bonnes and Smith standards.

[8] The attorney's fee standards of Title VII at issue in Smith are the same as the standards in §1988. Hensley v. Eckerhart, 461 U.S. 424, 433, n.7 (1983).

[9] The Fourth Circuit decided Disabled In Action after this Court denied certiorari in Bonnes. Long v. Bonnes, 455 U.S. 961 (1982).

Court cited to Bonnes and Nadeau. Id.[10]

Petitioners have, thus, made much ado over nothing. Their argument is simply a snapshot of the state of the law in the Fourth Circuit regarding the "catalyst" theory as of 1979, when Bonnes was decided. They completely ignored the effect of Smith and Disabled In Action.

The Petitioners also claim that the Second and Third Circuits apply the Bonnes test, citing Gerena-Valentin v. Koch, 739 F.2d 755 (2nd Cir. 1984) and N.A.A.C.P. v. Wilmington Medical Center, Inc., 689 F.2d 1161 (3rd Cir. 1982), cert. denied, 460 U.S. 1052 (1983). Petition at 10. This is also a superficial glance at the state of the law in those circuits. The Second Circuit in Gerena relied upon the decision in Nadeau in finding that there was no causal connection and that the case was superfluous. Id. at 758-759; see also, Gingras v. Lloyd, 740 F.2d 210 (2nd Cir. 1984). The Third Circuit did not cite to Bonnes but, instead relied upon Nadeau in its decision in N.A.A.C.P. v. Wilmington Medical Center, Inc., 689 F.2d at 1167. Later, the Third Circuit specifically stated that its standard was consistent with that of Nadeau and with this Court's decision in Hensley v. Eckerhart, 461 U.S. 424 (1983). Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897, 911-912 (3rd Cir. 1985).

Petitioners create further confusion by raising differences between the "significant issue" and "central

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[10]It is interesting to note that one of the Circuit Court judges on the panel in Bonnes (Russell, J.), one of the Circuit Court judges on the panel in Smith (Widener, J.) and one of the Circuit Court judges on the panel in Disabled in Action (Winter, C.J.) comprised the panel which decided Reigh II.

issue" tests which relate to the first prong of the catalyst theory. [11] This apparent conflict is not raised by this case. The Fourth Circuit follows the "significant issue" test later approved by this Court in Hensley v. Eckerhart, 461 U.S. at 433. See, Disabled in Action, 685 F.2d at 885.

B.

Where A Judgment Has Been Entered Against Plaintiff On The Merits, Every Other Circuit Court Has Recognized That Attorney's Fees Are Awardable If The Plaintiff's Lawsuit Caused The Defendant's Behavior To Change In An Enduring Way

Here, the Respondents prevailed to a limited extent and were, accordingly, awarded a limited amount of attorney's fees. The District Court held that the Petitioners "permanently" changed the information in the writ served upon a judgment debtor to include specific information regarding the procedures available to contest an attachment of property. Reigh II, App. at 29a-30a; see, footnote 5, supra.

Where plaintiffs have alleged that their lawsuits have caused the defendant's behavior to change in an enduring way even though judgment was ultimately entered on the merits

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[11] Petitioners correctly recognized that the Fifth, Sixth and Eleventh Circuits have adopted the "central issue test". Uviedo v. Steves Sash and Door Co., 760 F.2d 87, 88 (5th Cir. 1985), cert. denied, 106 S. Ct. 791 (1986) (six judges dissented from the denial of rehearing en banc and argued that the "central issue test" conflicts with Hensley); Kentucky Association for Retarded Citizens, Inc. v. Conn, 718 F.2d 182 (6th Cir. 1983); Taylor v. City of Ft. Lauderdale, 810 F.2d 1551 (11th Cir. 1987).

against them, every Circuit Court dealing with this issue has recognized that attorney's fees are awardable if the "catalyst" standard is met. Gingras v. Lloyd, 740 F.2d 210, 212 (2nd Cir. 1984); Ross v. Horn, 598 F.2d 1312, 1322 (3rd Cir. 1979), cert. denied, 448 U.S. 906 (1980); Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897, 912 (3rd Cir. 1985); Hennigan v. Ouachita Parish School Board, 749 F.2d 1148, 1152-53 (5th Cir. 1985); Fiarman v. Western Publishing Co., 810 F.2d 85, 86 (6th Cir. 1987); Janowski v. International Brotherhood of Teamsters Local No. 710, 812 F.2d 295, 297-98 (7th Cir. 1987); Greater Los Angeles Council on Deafness v. Community Television of Southern California, 813 F.2d 217, 219-20 (9th Cir. 1987); see also, United Handicapped Federation v. Andre, 622 F.2d 342, 345-46 (8th Cir. 1980) (fees awardable where summary judgement on the merits entered in favor of defendants but parties later entered into a settlement stipulation). [12]

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[12] Some courts have stated that a plaintiff cannot win attorney's fees while losing on the merits. Turner v. McMahon, 830 F.2d 1003 (9th Cir. 1987); Merkil v. Scovill, 787 F.2d 174 (6th Cir. 1986), cert. denied, 107 S. Ct. 585 (1986); Harris v. Pirch, 677 F.2d 681 (8th Cir. 1982); Ryan v. Mansfield State College, 677 F.2d 354 (3rd Cir. 1982). In none of these cases, however, did the plaintiff ever allege that the lawsuit caused changes in the behavior of the defendant. Other courts have held that if the change in the defendant's behavior only resulted because of an interium procedural order entered during the pendency of the lawsuit or that any change did not endure judgment, attorney's fees were not warranted. Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980); Palmer v. City of Chicago, 806 F.2d 1316 (7th Cir. 1986), cert. denied, 107 S. Ct. 2180 (1987); Jensen v. City of San Jose, 806 F.2d 899 (9th Cir. 1986) (en banc); Doe v. Busbee, 684 F.2d 1375 (11th Cir. 1982).

II.

THE FOURTH CIRCUIT DECISION DOES NOT CONFLICT WITH THIS COURT'S HOLDING IN HEWITT V. HELMS NOR WITH THE POLICY BEHIND 42 U.S.C. §1988

In Reigh II, the Fourth Circuit held that this Court's recent decision in Hewitt v. Helms, ____ U.S. ____, 107 S. Ct. 2672 (1987), supports its decision. Reigh II at 1335; App. at 3A-4A. [13] The Fourth Circuit then recognized, in upholding the decision of the District Court, that the Respondents' suit achieved a limited change in the notice actually given to the judgment debtor and that they were prevailing parties to a limited extent. Id. [14]

The Petitioners rely upon Kentucky v. Graham, 473 U.S. 159 (1985) to support its claim that a completely successful defendant should not have to pay a completely

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[13] This Court held that a plaintiff who did not obtain any beneficial action (as opposed to simply a beneficial judgment) from the defendant cannot be awarded fees. Hewitt v. Helms, 107 S.Ct. at 2676. "Redress is sought through the court, but from the defendant." Id. A favorable judicial statement of law by an appellate court which does not result in a declaratory judgment nor a beneficial change in the defendant's behavior is insufficient. Id. at 2677. This Court, recognizing the possible applicability of the "catalyst" theory regarding a change in behavior which the defendant did make, held that the plaintiff had been released from prison and that his return to prison sometime later was a mere "fortuity." Id.

[14] The Respondents in this case have at all times continued to be judgment debtors and have, at all times, been subject to the possibility of future attachments of property in the hands of third persons, most notably bank accounts. The claims of the Respondents have not become moot throughout the pendency of this matter. Reigh I, 784 F.2d at 1194; App. at 46a; see, Juidice v. Vail, 430 U.S. 327, 322-333, n.9 (1977); Grimes v. Miller, 429 F.Supp. 1350 (M.D. N.C. 1977), aff'd, 434 U.S. 978 (1978); Harris v. Bailey, 675 F.2d 614, 616 (4th Cir. 1982). There is no mere "fortuity" here as existed in Hewitt. The Petitioners' claim that the Respondents cannot benefit from the changes in the amended rules of procedure is therefore specious. See, Petitioner's Brief at 20, n.12.

unsuccessful plaintiff any attorney's fees.[15] Petitioners erroneously rely on that case since it dealt only with the issue of whether fees can be obtained against the state depending upon whether the officials are sued in their personal, as opposed to official capacities. Id. In fact, this Court expressly limited its holding by stating: "We express no view as to the nature or degree of success necessary to make a plaintiff a prevailing party." Id. at 165, n.9.

The legislative history of §1988 clearly contemplates an award of fees in this instance.[16] Further, there is no common sense or policy reason to award fees where the plaintiff meets the Nadeau test although the case was dismissed as moot due to changes in the defendant's behavior but

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[15]Respondents agree that a totally unsuccessful plaintiff should not recieve attorney's fees. But the Respondents were successful in obtaining a declaration by the District Court that the old rules of procedure in Maryland which provided no notice whatsoever before, at the same time or at any time after the attachment of a bank account containing exempt funds were unconstitutional as well as ultimately obtaining changes in the actual content of the notice, a change which the District Court found factually to be "a permanent one". App. at 150a, 29a-30a. This factual finding was upheld. Reigh II at 1336; App. at 4a. The District Court holding that the lawsuit itself did not cause the changes between the original rules and the amended rules is a legal conclusion and is the subject of Respondents' Cross-Petition for Certiorari.

[16]The House Report indicates that a person may in some circumstances be a "prevailing party" without having obtained a favorable "final judgment following a full trial on the merits." H.R. Rep. No. 94-1558, p. 7 (1976); see also, S. Rep. No. 94-1011, p. 5 (1976); Hanrahan v. Hampton, 446 U.S. 754, 756-757 (1980).

to deny fees in the instant case. [17] The only distinction is the Respondents here believed that due process required more, pursued the issue, but eventually lost on that point on appeal. The amount of the award may be smaller in the latter situation but some award is certainly appropriate.

III.

AN AWARD OF ATTORNEY'S FEES IS NOT BARRED BY THE ELEVENTH AMENDMENT

The Petitioners' argument on this issue is a red herring; one which the Fourth Circuit wisely ignored. [18] 42 U.S.C. §1988 abrogates sovereign immunity and allows an award of attorney's fees in any action or proceeding to enforce §1983 if the plaintiff "prevails." Thus, if a plaintiff files an action to enforce §1983, whatever the final disposition of the case, the plaintiff need only show that he or she has "prevailed." The standard governing when one "prevails" was discussed above and is the issue to be focused upon.

Petitioners allege that the Attorney's Fees Act overrides the state's immunity only if the action is one in

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[17] None of the circuit courts dealing with this issue has held that a dismissal of the case as moot is an impediment to an award of fees. Exeter-West Greenwich Regional School District v. Pontarelli, 788 F.2d 47 (1st Cir. 1986); Durett v. Cohen, 790 F.2d 360 (3rd Cir. 1986); Robinson v. Kimbrough, 652 F.2d 458 (5th Cir. 1981); Johnston v. Jago, 691 F.2d 283 (6th Cir. 1982); Gekas v. Attorney Registration & Disciplinary Com'n, 793 F.2d 846 (7th Cir. 1986); Fitzharris v. Wolff, 702 F.2d 836 (9th Cir. 1983); Supre v. Ricketts, 792 F.2d 958 (10th Cir. 1986); Maloney v. City of Marietta, 822 F.2d 1023 (11th Cir. 1987).

[18] This contention was raised on appeal. Appellants'/Cross- Appellees' Brief at 12-14.

which the plaintiff actually secures rights within the meaning of §1983, that is, wins on the merits. Petition at 24. Such a claim does not survive the actual language of 42 U.S.C. §1988 as shown above nor the legislative history. [19]

Such a claim flies in the face of the holdings of this Court. North Carolina Department of Transportation v. Crest Street Community Council, Inc., 479 U.S. _____, 107 S. Ct. 336, 341-342 (1986) (at a minimum, a party may be awarded fees if there is an out-of-court settlement or the defendant voluntarily ceases the unlawful practice); Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (a party can "prevail" if it succeeds on any significant issue which achieves some benefit, endorsing the Nadeau standard); Maher v. Gagne, 448 U.S. 122, 131-133 (1980) (the Court rejected the argument that the Eleventh Amendment bars an award of fees when the plaintiff settled the case favorably where both a statutory and constitutional claim were involved and even where the plaintiff prevailed on a wholly statutory, non-civil rights claim (for which fees cannot be awarded) which was coupled with a substantial constitutional claim). Most recently, this Court stated that:

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under §1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment - e.g., a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurrs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

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[19] See, footnote 16, supra.

Hewitt v. Helms, __ U.S. __, 107 S. Ct. 2672, 2676 (1987).[20]

Suffice it to say that the Petitioners mix apples and oranges by raising the Eleventh Amendment as a legal bar when what they are really complaining about again is the mere fact that they obtained a judgment on the merits and believe this ipso facto bars any award of fees. Thus, their Eleventh Amendment argument adds nothing to their request for review and the Court should disregard it.

CONCLUSION

There is no clear conflict among the Circuit Courts in light of revisions to the Bonnes test endorsed by the Fourth Circuit. The Fourth Circuit decision does not conflict with this Court's holding in Hewitt v. Helms. Finally, there is no Eleventh Amendment bar to the award of fees under §1988. For these reasons, the modest award of

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[20]The Petitioners again rely upon this Court's decision in Kentucky v. Graham, 473 U.S. 159 (1985). As stated above, that decision only raised the issue of whether fees can be awarded against the state where a plaintiff obtains a settlement in a damage action filed against government employees in their personal capacities. On the contrary, here, only injunctive and declaratory relief was sought and the clerks were only sued in their official capacities.

fees was not improper.[21] The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[21] Respondents state this even though they are filing a Cross-Petition because they believe most strongly that review by this Court is unnecessary and are willing to live with an award of fees of $2,409.20 for the time spent on the merits in the District Court. If this Court grants review, Respondents believe that a Cross-Petition is important to allow review of all of the District Court's decision as, legally, more fees should have been awarded.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29 day of January, 1988, one copy of the foregoing document was mailed, postage prepaid, to Ralph S. Tyler, Assistant Attorney General, 7 North Calvert Street, 2nd Floor, Baltimore, Maryland 21202.

Elizabeth Renuart